

October 7, 1999

Todd Okun, Esq.

Styskal, Wiese & Melchione, LLP

550 North Brand Boulevard, Suite 550

Glendale, CA 91203

Re: FOIA Appeal, your letter dated September 13, 1999

Dear Mr. Okun:

On July 22nd and 23rd, 1999, you filed separate Freedom of Information Act (FOIA) requests for records concerning the community conversion appeals made by your clients Hudson Valley Federal Credit Union and Mid-Hudson Valley Federal Credit Union. You requested any documentation prepared and utilized by NCUA staff for these appeals, an audio tape of the July 22, 1999, open Board meeting, and any submissions to the NCUA by the Twelve Concerned Credit Unions regarding the appeals. You specifically requested documentation on the interaction issue. Dianne Salva, NCUA's FOIA Officer, responded to both requests in one letter dated August 26, 1999. Your request was granted in part and denied in part. You received the audio tape and approximately 300 pages of documentation. Approximately 25 pages of the 300 pages released contained redactions. In addition, Ms. Salva noted that seven pages of the Regional Office's record of action were withheld. The redactions and pages not released were withheld pursuant to exemptions 4, 5, and 8 of the FOIA. Your appeal is granted in part and denied in part. The seven pages previously withheld are now released with one redaction pursuant to exemption 8. These pages are enclosed. The information redacted from the 25 pages continues to be withheld pursuant to exemptions 5 and 8.

The seven page document withheld was the Region I Record of Action on the proposed community charter conversion for Hudson Valley FCU. There was a similar seven page document for Mid-Hudson Valley FCU that was released to you with the FCU's CAMEL code redacted. The same document should have been released for Hudson Valley. It is enclosed with the CAMEL code redacted.

The 25 pages released with redactions were contained in the following four documents: 1) 12-page memo from Hattie Ulan to the NCUA Board concerning Hudson Valley FCU, dated 7/8/99; 2) 12-page memo from Hattie Ulan to the NCUA Board concerning Mid-Hudson Valley FCU dated 7/8/99; 3) 8-page Regional Summary on Worchester FCU; and 4) one handwritten page of notes. The complete Regional Summary on Worchester FCU contained 11 rather than 8 pages. The last 3 pages of that memo were withheld in full but were not specifically noted in Ms.

Salva's letter. These 3 pages were withheld and continue to be withheld pursuant to exemptions 4, 5, and 8 of the FOIA.

Exemption 4

The information withheld pursuant to exemption 4 consists of information from the credit union's business and marketing plans, including financial projections. Exemption 4 includes information that is "commercial or financial, obtained from a person and privileged or confidential. 5 USC 552(b)(4). The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce," American Airlines, Inc. v. National Mediation Board,

588 F.2d 863, 870 (2d Cir. 1978). Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC,

92 F.3d 93, 95 (2d. Cir. 1996). All of the information withheld pursuant to exemption 4 meets the broad interpretation of commercial or financial information. Information obtained from credit unions meets the standard of obtained "from a person" under Nadler. The third requirement of exemption 4 is met if information is "privileged or confidential." In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C.Cir. 1992), cert. denied, 507 U.S.984 (1993), the court established two distinct standards to be used in determining whether commercial information submitted to an agency is "confidential" under exemption 4. Information which is required to be submitted to a government agency is subject to a stricter standard than information which is voluntarily submitted to an agency. The information withheld pursuant to exemption 4 in this case is subject to the stricter required standard. In order to be deemed confidential under the stricter required standard, one of two prongs set forth in National Parks & Conservation Association v. Morton, 498 F2d 765 (D.C.Cir. 1974), must be met. The information is confidential under National Parks if its release would

(1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks at 770. We believe that all of the information withheld meets the second prong of National Parks.

Exemption 5

The information withheld and redacted pursuant to exemption 5 consists of staff opinions and recommendations expressed prior to final action by the NCUA Board. Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 USC 552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege. The purpose of this privilege is "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Any one of the following three policy purposes have been held to constitute a basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds

for an agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982). The first and third policies enumerated in Russell apply in this case. The second policy does not apply since the NCUA Board has taken final agency action in the Hudson Valley appeals.

Exemption 8

The information withheld pursuant to exemption 8 consists of CAMEL ratings and other examination information. Exemption 8 (5 USC 552(b)(8)) of the FOIA applies to information:

contained in or related to examination, operating or

condition reports prepared by, on behalf of, or for

the use of an agency responsible for the regulation

or supervision of financial institutions.

The courts have discerned two major purposes for exemption 8 from its legislative history: 1) to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and

2) to promote cooperation and communication between employees and examiner. *See Atkinson v. FDIC*, 1 GDS 80,034, at 80,102 (D.C. Cir. 1980). Examination information, including CAMEL ratings, fits squarely within the language of exemption 8. Both purposes outlined in Atkinson are met. Release of the information could reasonably harm the financial security of a credit union and interfere with the relationship between a credit union and NCUA.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where the requester's principal place of

business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

99-0945

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Enclosure